



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2011

Mr. David M. Douglas
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2011-00638

Dear Mr. Douglas:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 405649.

The Austin Police Department (the "department") received three requests from the same requestor for information relating to an accident involving an Austin police officer. You indicate the department will release the submitted crash report.¹ You claim the rest of the requested information is excepted from disclosure under section 552.103 of the Government Code.² We have considered the exception you claim and reviewed the information you submitted.³

Initially, we address the department's obligations with respect to the submitted letter from the requestor dated September 23, 2010. Among other things, the September 23 letter

¹We note that as the requestor has provided the department with two of the three items of information specified by section 550.065 of the Transportation Code, the requestor is entitled to obtain a copy of the crash report. *See* Transportation Code § 550.065(c)(4).

²Although you also claimed section 552.108 of the Government Code, you have withdrawn your assertion of that exception. Accordingly, this decision does not address section 552.108.

³This letter ruling assumes the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

requests (1) any and all statements taken from [the requestor's] client and (2) confirmation of insurance coverage and policy limits. As you do not claim an exception to disclosure of the requested information, we assume the department has released any responsive information that existed when the department received the request. If not, then any such information must be released immediately.⁴ See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

Next, we note some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the submitted offense report, incident detail report, and photographs constitute a completed investigation made by the department. Thus, the department must release that information, which we have marked, pursuant to section 552.022(a)(1), unless the information is expressly confidential under other law or excepted from disclosure under section 552.108. You do not claim an exception to disclosure under section 552.108. Although you seek to withhold the information encompassed by section 552.022(a)(1) under section 552.103, we note that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. See *id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022(a)(1). Therefore, the department may not withhold any of the marked information encompassed by section 552.022(a)(1) under section 552.103. We note section 552.130 of the Government Code is applicable to some of the information encompassed by section 552.022(a)(1).⁵ As section 552.130 is other law that makes information confidential for purposes of section 552.022(a)(1), we will address that exception. We also will address the department's claim under section 552.103 for the submitted information that is not encompassed by section 552.022(a)(1).

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. See Gov't Code § 552.130(a)(1)-(2). The department must withhold the Texas driver's license and motor vehicle information we have marked, along

⁴We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

⁵Unlike other exceptions to disclosure under the Act, this office will raise section 552.130 on behalf of a governmental body, as this exception is mandatory and may not be waived. See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

with the Texas license plate number of the police officer's vehicle that appears in the submitted photographs, under section 552.130.⁶ We note the information encompassed by section 552.022(a)(1) also contains the requestor's client's Texas driver's license and motor vehicle information, which the department would ordinarily be required to withhold. Because section 552.130 protects personal privacy, the requestor has a right of access to his client's Texas driver's license and motor vehicle information. *See* Gov't Code § 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself).⁷ Thus, the client's Texas driver's license and motor vehicle information may not be withheld from this requestor under section 552.130.⁸

Section 552.103 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, a governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law*

⁶We note this office issued Open Records Decision No. 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including a Texas driver's license number, a Texas license plate number, and the portion of a photograph that depicts a Texas license plate number, under section 552.130.

⁷Section 552.023 provides in part that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a).

⁸Should the department receive another request for these same records from a person who would not have a right of access to the requestor's client's private information, the department should resubmit these records and request another decision. *See* Gov't Code §§ 552.301(a), .302.

Sch. v. Tex. Legal Found., 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. See Open Records Decision No. 551 at 4 (1990).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* This office has concluded that a governmental body’s receipt of a claim that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the “TTCA”), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If this representation is not made, then the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. See Open Records Decision No. 638 at 4 (1996).

You contend the department reasonably anticipated litigation when it received the requests for information dated October 20 and November 15, 2010. You state the requestor’s letter dated September 23, 2010 appears to comply with the notice requirements of the TTCA. You also state the information not encompassed by section 552.022(a)(1) is related to that litigation. Based on your representations and the September 23 letter, we conclude the department may withhold the information not encompassed by section 552.022(a)(1) under section 552.103 of the Government Code.

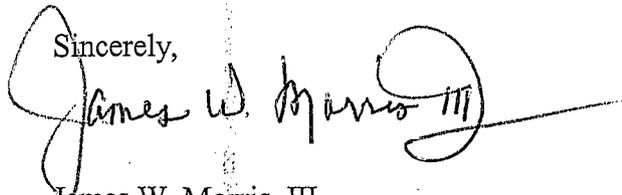
In reaching this conclusion, we assume the opposing party in the anticipated litigation has not already seen or had access to any of the information in question. We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. See ORD 551 at 4-5. If the opposing party has seen or had access to information relating to anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) the department must withhold the Texas driver’s license and motor vehicle information we have marked and the Texas license plate number of the officer’s vehicle that appears in the photographs under section 552.130 of the Government Code; (2) the department must release the rest of the marked information encompassed by section 552.022(a)(1) of the Government Code; and (3) the department may withhold the rest of the information at issue under section 552.103 of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "James W. Morris III". The signature is written in a cursive style with a large, looping initial "J" and a long horizontal stroke extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 405649

Enc: Submitted information

c: Requestor
(w/o enclosures)